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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 807

O. W. DONALD,

Petitioner,

vs.

ZACK MEYER'S T.V. SALES and SERVICE, ET AL,

Respondents.

PETITION FOR A WRIT OF CERTORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES

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SUPREME COURT OF THE UNITED STATES
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O. W. DONALD,

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ZACK MEYER'S T.V. SALES
and SERVICE, ET AL.

Respondents.

PETITION FOR A WRIT OF CERTORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

O. W. Donald respectfully prays that a writ of certorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit made and entered on the twentieth day of May, 1970, reversing a judgment of the District Court for the Western District of Texas, Austin Division, holding that Copyright Registration A530831 is valid and infringed, and granting an injunction against Moore Business Forms, Inc.

Opinions Below

The District Court's opinion is unreported. The Court of Appeal's opinion is reported at 426 F.2d 1027 (1970). All of said opinions are appended hereto in the Appendix.

Jurisdiction

The judgment sought to be reviewed was made and entered on May 20, 1970. Petition for Rehearing was denied on July 8, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Does the word arrangement used in Copyright Registration A530831 for "Agreement" which comprises 161 words constitute a distinguishable variation over the word arrangement in 11 Am. Jur. Legal Forms § 1447 (1958) which comprises in excess of 855 words?

2. Are legal forms such as the "Agreement" of Copyright Registration A530831 subject to copyright?

3. Is the quantum of originality required in book copyrights wherein the "Agreement" of Copyright Registration A530831 is classified the same as that required in map copyrights?

Statutes Involved

United States Constitution, Article I, Section 8, Clause 8:

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries,

Statement of the Case

The jurisdiction of the District Court was originally invoked under Title 17, United States Code, respecting copyrights.

Petitioner, O. W. Donald, is the author and originator of the first printed invoice containing a "conditional sales contract or chattel mortgage agreement" which was especially created for use by those engaged in television repair services.

During the preparation of such "Agreement" of Copyright Registration A530831 Donald sought and obtained legal counsel and advice (A.48)* in that:

"I had several attorneys, a municipal judge in Fort Smith, a municipal judge in Little Rock, Arkansas, the Attorney General, Mr. Bruce Bennett, Honorable Bruce Bennett of the State of Arkansas, and other prominent attorneys look over the wording and arrangement, and I asked their advice."

Prior to Donald's first copyrighted "Agreement", Form 111 (A.55), there was nothing of this nature available for the service

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*A references are to the Appendix to the Briefs

dealer's protection. Donald's contribution was so significant that he has been able to establish more than 1,250 wholesale distributors who, each year, sell millions of copies of invoices containing such type "Agreement" throughout the United States and Canada. There is further evidence of such novelty in that respondent Moore Business Forms, Inc. has copied and infringed Donald's copyrighted works on at least sixteen occasions (A.35).

In this cause of action respondent Moore Business Forms, Inc. admits (A.20) that it did copy Donald's "Agreement" here in issue.

The District Court found that Donald had a valid copyright on the language used by Moore and that Moore infringed Donald's copyright by printing and selling offending forms. The Court enjoined Moore from any further infringement and assessed costs of suit against Moore as required by 17 U.S.C. § 116. Finding that respondent Zack Meyer's T.V. Sales and Service had nothing to do with the selection of language in the forms supplied by Moore, the Court held that Zack Meyer's was not liable for copyright infringement and had been unnecessarily joined as a party defendant and Zack Meyer's counsel fees were divided equally between Moore and Donald. Moore appealed from the decision of the trial court claiming that Donald's copyright was invalid for lack of originality, with which the Court of Appeals agreed, reversing the trial court's determination.

It is to review the decision of that court that this petition is sought.

Reasons Relied Upon for the Allowance of the Writ

I

This petition presents a threshold issue of far-reaching import in that if the Court's rationale is followed every copyrighted legal instrument, legal form and legal form book containing such copyrighted works will be invalidated.

The Court on page 6 of the Opinion states "The order and arrangement of the subject matter in the 'Agreement' are identical with several forms suggested in prior works. See e.g., 11 Am. Jur. Legal Forms, § 1447 (1958). The word

arrangement used, while not identical, is at most only a paraphrase of various portions of earlier forms, ...". Furthermore, on page 9 of said Opinion, the Court states that "While the 'Agreement' is not identical to any single existing form, the substance of each sentence can be found in an earlier form." Thus the Court unequivocally states that the "word arrangement" in petitioner's work is not identical to any single form but merely the "order and arrangement" and "substance of each sentence" are similar.

In Chamberlin v. Uris Sales Corporation, 150 F.2d 512 (2 Cir. 1945) it is stated:

"The right secured by a copyright is the right to that arrangement of words which the author has selected to express his ideas and not the right to employ ideas expressed thereby."

And further:

"The right secured by a copyright is not the right to the use of certain words, nor the right to employ ideas expressed thereby, but is the right to that arrangement of words which the author has selected to express his ideas." Dorsey v. Old Surety Life Ins. Co., 98 F.2d 872 (10 Cir. 1938).

And still further:

"But the cases indicate that the 'originality' required refers to the form of expression and not to novelty in the subject matter." Whist Club v. Foster, 42 F.2d 783 (S.D.N.Y. 1929).

Nimmer, on pages 34.2-35 states:

"Any 'distinguishable variation' of a prior work will constitute sufficient originality to support a copyright if such variation is the product of the author's independent efforts, and is more than merely trivial. This doctrine owes its origin in large part to the words of Mr. Justice Holmes in Bleistein v. Donaldson Lithographing Co.:"

"It would be a dangerous undertaking for persons trained only to the law to constitute themselves judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which

appealed to a public less educated than the judge. Yet if they command the interest of the public, they have a commercial value - and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change. That these pictures have their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiff's rights."

"The Bleistein doctrine that judges may not properly assay artistic merit has found expression in many succeeding cases where the author's creative contribution was of a much humbler and minimal nature than in the Bleistein poster. As was said in the leading case of Alfred Bell and Co. Ltd. v. Catalda Fine Arts Inc. originality for copyright purposes amount to '. . . little more than a prohibition of actual copying. No matter how poor the 'author's' addition, it is enough if it be his own.' Thus, in general, it may be concluded that if any author's independent efforts contain sufficient skill to motivate another's copying there is ipso facto a sufficient quantum of originality to support a copyright." Amplex Mfg. Co. v. A.B.C. Plastic Fabricators Inc., 184 F.Supp. 285 (E.D. Pa. 1960).

Mr. Justice Story in Emerson v. Davies, 8 Fed. Cas. 615, No. 4436 (C.C.D.Mass. 1845) stated:

"In truth, in literature, in science and in art, there are, and can be, few, if any, things which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows and must necessarily borrow, and use much which was well known and used before. . . . If no book could be the subject of copyright which was not new and original in the elements of which it is composed, there could be no ground for any copyright in modern times, and we would be obliged to ascend very high, even in antiquity, to find a work entitled to such eminence. Virgil borrowed much from Homer; Bacon drew from earlier as well as contemporary minds; Coke exhausted all the known learning of his profession; and even Shakespeare and Milton . . . would be found to have gathered much from the abundant stores of current knowledge and classical studies in their days. . . . In truth every author of a book has a copyright in the plan, arrangement and combination of his materials, and in his mode of illustrating his subject, if it be new and original in its substance."

An inspection of petitioner's "Agreement" on page 2 of the Opinion reveals that the arrangement of words in Copyright Registration A530831 which comprises 161 words is not substantially similar to, but constitutes a distinguishable variation over the word arrangement of 11 Am. Jur. Legal Forms § 1447 (1958) which comprises in excess of 855 words and is presented on pages 25-27.

II

On page 9 of the Opinion, the Court holds that "Donald's 'Agreement' was not subject to copyright. . . .". As stated on page 157 of Nimmer, "There appear to be no valid grounds why legal forms such as contracts, insurance policies, pleadings and other legal documents should not be protected under the law of copyright." The only case law, namely, Continental Casualty Co. v. Beardsley 253 F.2d 702 (2d Cir. 1958); Brightley v. Littleton 37 Fed. 103 (C.C.E.D.Pa. 1888); and Miner v. Employers Mutual Liability Insurance Company of Wisconsin 229 F.2d 35 (D.C. Cir. 1956) hold "We find nothing which, as a matter of law prevents the copyrighting of forms and insurance instruments . . .".

III

The rationale of the Court as set forth on pages 6-9 of the Opinion relative to Amsterdam v. Triangle, if followed, will engraft into the area of book copyrights a special rule of originality which heretofore has been applied only to map copyrights and which appears to go far beyond anything warranted by the Copyright Act or prior case law. In Amsterdam the court held that the originality necessary to support a copyright in a map must consist largely of information gathered by direct observation of the geographic features depicted in the map so that an independent arrangement or selection of items taken only from public domain maps without direct observation of the features contained therein will not in itself offer sufficient originality.

On pages 81-83 of Nimmer, it is stated:

"Sec. 7 of the Copyright Act which provides in part that 'compilations', or abridgements, adaptations, arrangements . . . or other versions of works in the public domain, . . . shall be regarded as new works subject to copyright under the provisions of this title . . . Thus originality for purposes of copyright may consist merely in the labor of compiling, abridging, adapting or arranging works in the public domain. This principle has been broadly recognized with respect to numerous types of copyrighted works."

"The fallacy of the direct-observation rule stems from the Amsterdam court's misunderstanding of the copyright concept of originality. The court proceeded from the undoubted premise that 'To be copyrightable a map must be the result of some original work' to the false conclusion that 'original work' somehow requires direct observation."

"Subsequent to the Amsterdam opinion, the direct-observation rule seems to have been rejected in C.S. Hammond & Co. v. International Globe Inc." 210 F.Supp 206 (S.D.N.Y. 1962). Thereafter, the Court of Appeals for the Ninth Circuit again had occasion to consider the direct-observation rule in County of Ventura v. Blackburn 362 F.2d 515 (9th. Cir. 1966) wherein said court avoided a confrontation with the direct-observation rule.

This matter is one of profound significance in that if the court's rationale is followed there will be engrafted into book copyrights the special rule of originality which has heretofore been applied only to map copyrights wherein the quantum of originality goes far beyond anything warranted by the Copyright Act or prior case law. Furthermore, the quantum of originality set forth in Amsterdam is now rejected even in map copyright cases.

CONCLUSION

The writ of certorari should be granted.

Respectfully submitted.

John C. Stahl

JOHN C. STAHL
P. O. Box 13236
San Antonio, Texas 78213

Attorney for Petitioner

PROOF OF SERVICE

I, John C. Stahl, the attorney for O. W. Donald, the petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 3 day of October, 1970, I served copies of the foregoing Petition for a Writ of Certorari to the United States Court of Appeals for the Fifth Circuit on the several parties thereto, as follows:

On Zack Meyer's T.V. Sales and Service, and Moore Business Forms, Inc., respondents, by mailing copies in duly addressed envelopes, with air mail postage prepaid, to their respective attorneys of record, as follows:

To: Charlie D. Dye, Esq., Brown, Erwin, Maroney & Barber, attorneys for Zack Meyer's T.V. Sales and Service, 900 Brown Building, Austin, Texas 78701.

To: Jerry L. Buchmeyer, Esq., Thompson, Knight, Simmons & Bullion, attorneys for Moore Business Forms, Inc., 2300 Republic National Bank Building, Dallas, Texas 75201.

John C. Stahl

JOHN C. STAHL
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Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

O. W. DONALD,
Plaintiff

Civil Action No. 66-55-A

vs.

ZACK MEYER'S T.V. SALES AND SERVICE, ET AL.,
Defendants

(Filed: July 22, 1969)

FINAL JUDGMENT

On the 10th day of June, 1969, came on to be heard the above styled and numbered cause wherein O. W. Donald is plaintiff, and Zack Meyer's T.V. Sales and Service and Moore Business Forms, Inc., are defendants. Came Plaintiff and defendants and announced ready for trial. No jury having been demanded within the time and in the manner prescribed by law, all matters of fact and of law were submitted to the court for determination. Having heard the pleadings, evidence and argument of counsel, the Court finds, and it is ORDERED, ADJUDGED AND DECREED by the Court as follows:

1. That plaintiff has a valid copyright under Copyright Registration No. A530831 to the "Agreement" language on his Form No. 555.

2. That defendant Moore Business Forms, Inc. infringed that copyright by reproducing said "Agreement" language on invoice forms which it printed and sold in January of 1965 to the second defendant, Zack Meyer's T.V. Sales and Service.

3. That plaintiff file with the Clerk of this Court a bond in the penal sum of $1,500.00 in form and with surety to be approved by this Court that effective upon the filing and approval of such bond, it is ORDERED that defendant Moore Business Forms, Inc., be, and it is hereby permanently enjoined from deliberately or designedly using an arrangement of

language which infringes on plaintiff's copyright on the "Agreement" language on his Form No. 555.

4. That defendant Zack Meyer's T.V. Sales and Service do have and recover an attorney's fee in the amount of $600.00, the same to be taxed as costs herein, $300.00 of which is taxed against plaintiff and $300.00 of which is taxed against defendant Moore Business Forms, Inc.

5. That all costs of suit not otherwise provided for herein be, and the same are hereby taxed against defendant Moore Business Forms, Inc.

6. That all other relief not expressly granted herein, is hereby specifically denied.

ORDERED at Austin, this 22 day of July, 1969.

s/ Jack Roberts
Jack Roberts, United States
District Judge

APPROVED AS TO FORM:

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Service

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28447

O. W. DONALD,
Plaintiff-Appellee,

versus

ZACK MEYER'S T. V. SALES and SERVICE, ET AL,
Defendants,
MOORE BUSINESS FORMS, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

(May 20, 1970)

Before WISDOM, GOLDBERG and INGRAHAM, Circuit Judges.

GOLDBERG, Circuit Judge: In this infringement suit a maker of business forms seeks copyright protection[1] for a common legal form. The characters in this

[1]See 17 U.S.C.A. § 1 *et seq.*, for the statutory provisions relating to copyright.

drama are O. W. Donald, the copyright claimant; Moore Business Forms, Inc., the alleged infringer; and Zack Meyer's T. V. Sales and Service, the innocent bystander. Act I of this play ended when the trial court found for Donald. We rewrite the script and reverse.

In 1961 Donald registered with the copyright office the following paragraph:

"Agreement"

> "For value received, the undersigned jointly and severally promise to pay to the Dealer, or order, the unpaid balance shown on this invoice according to the agreed terms. Title to said Chattel, described hereon by model, make and serial number, is hereby retained, or transferred to Dealer until Customer has paid in cash all amounts owing said Dealer. Customer shall not misuse, secrete, sell, encumber, remove or otherwise dispose of or lose possession of said Chattel. There is no outstanding lien, mortgage, or other encumbrance against said Chattel. Should Customer fail to pay its indebtedness when due, or breach this contract, the entire unpaid balance shall at once become due and payable, and Dealer may without notice or demand, by process of law, or otherwise, take possession of said Chattel wherever located and retain all monies paid thereon for use of said Chattel. This Agreement may be assigned."

This language, known as the "Agreement," was printed at the bottom of standard invoice forms which Donald printed and sold to television dealers and repairmen. Moore began using this language on its forms when one of its customers ordered a set of invoices and specifically requested that this language be included on the forms. The customer apparently had clipped the requested language from a form prepared by Donald. Subsequently, when Zack Meyer ordered invoice forms from Moore, Moore copied the language that its previous customer had requested.

Upon discovering Zack Meyer's forms, Donald brought suit against Moore and Zack Meyer, claiming that their use of the language contained in the "Agreement" infringed Donald's copyright. The trial court, while expressing doubt concerning the originality of the "Agreement," found that Donald had a valid copyright on the language used by Moore and that Moore had infringed Donald's copyright by printing and selling the offending forms. The court enjoined Moore from any future infringement and assessed the costs of suit against Moore as required by 17 U.S.C.A. § 116.[2] Finding that Zack Meyer had nothing whatever to do with the selection of language in the forms supplied by Moore, the court held that Zack Meyer was not liable for any copyright infringement and had been unneces-

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[2] 17 U.S.C.A. § 116. Costs; attorney's fees

> "In all actions, suits, or proceedings under this title, except when brought by or against the United States or any officer thereof, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs."

sarily joined as a party defendant by Donald. Zack Meyer's counsel fees were divided equally between Moore and Donald.

Moore has appealed from the decision of the trial court, claiming that Donald's copyright is invalid for lack of originality. We agree.

It is too plain to be denied that the "Agreement" is nothing more than an ordinary conditional sales contract or chattel mortgage agreement, an instrument familiar to even the most inexperienced legal practitioner. It is the type of contract which has been published in numerous form books, many of which are themselves copyrighted. See, e.g., Am. Jur. Legal Forms and Stayton Texas Forms.

Plaintiff, a non-lawyer who stated that he studied law for approximately one year, has denied that he used these prior works in preparing the "Agreement." However, considering the technical difficulties involved in drafting such a form, plaintiff's limited legal education, and his obvious access to and knowledge of these forms from his uncompleted legal studies, we have no doubt that plaintiff either consciously or unconsciously availed himself of these prior works while drafting the "Agreement." Moreover, the striking similarity in arrangement, order, and wording between plaintiff's "Agreement" and the standard forms is sufficient to compel a finding that plaintiff used these earlier works. *Orgel v. Clark Boardman Co.*, 2 Cir. 1962, 301 F.2d 119, *cert. denied*, 371 U.S. 817; *Arnstein v. Porter*, 2 Cir. 1946, 154 F.2d 464.

Neither the existence of these earlier forms nor Donald's use of them, however, necessarily renders his paragraph ineligible for copyright protection. It is settled law that to obtain a valid copyright, as distinguished from a patent, the applicant need not show that the material in question is unique or novel; it need only be original. *Gelles-Widmer Co. v. Milton Bradley Co.*, 7 Cir. 1963, 313 F.2d 143, *cert. denied*, 373 U.S. 913; *Alfred Bell & Co. v. Catalda Fine Arts*, 2 Cir. 1951, 191 F.2d 99. Thus a work may be protected by copyright even though it is based on a prior copyrighted work or something already in the public domain if the author, through his skill and effort, has contributed a distinguishable variation from the older works. *Gelles-Widmer Co. v. Milton Bradley Co.*, *supra*; *Millworth Converting Corp. v. Slifka*, 2 Cir. 1960, 276 F.2d 443; *Alfred Bell & Co. v. Catalda Fine Arts*, *supra*. In such a case, of course, only those parts which are new are protected by the new copyright. *Dorsey v. Old Surety Life Ins. Co.*, 10 Cir. 1938, 98 F.2d 872.

In determining the amount of originality required it is frequently stated that the standards are minimal and that in copyright law "originality means little more than a prohibition against copying." *Gelles-Widmer Co. v. Milton Bradley Co.*, *supra*. *Day-Brite Lighting, Inc. v. Sta-Brite Fluorescent Manufacturing Co.*, 5 Cir. 1962, 308 F.2d 377; *Alfred Bell & Co. v. Catalda Fine Arts*, *supra*. Nevertheless, something more than merely refraining from outright copying is required before a new variation on an old work has sufficient originality to be copyrightable. The author must add "some sub-

stantial not merely trivial originality." *Chamberlin v. Uris Sales Corp.* 2 Cir. 1945, 150 F.2d 512, 513. The variation must be meaningful and must result from original creative work on the author's part. *Amsterdam v. Triangle Publications, Inc.*, 3 Cir. 1951, 189 F.2d 104; *Andrews v. Guenther Publishing Co.*, S.D. N.Y. 1932, 60 F.2d 555; *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*, 2 Cir. 1922, 281 F.83, *cert. denied*, 259 U.S. 581; *McIntyre v. Double-A Music Corp.*, S.D. Calif. 1959, 179 F.Supp. 160; *Alva Studios, Inc. v. Winninger*, S.D. N.Y. 1959, 177 F.Supp. 265; *Smith v. George E. Muehlebach Brewing Co.*, W.D. Mo. 1956, 140 F.Supp. 729. As the court said in *Smith*,

> "'Originality' in the above context means that the material added to what is in the public domain, must have aspects of 'novelty' and be something more than a trivial addition or variation. Cf. Chamberlin v. Uris Sales Corporation, 2 Cir., 150 F.2d 512. If what is added does not itself give some value to a public domain composition, or serve some purpose other than to merely emphasize what is present and subsisting in the public domain, it is not entitled to copyright. . . ." 140 F.Supp. at 731.

In the case before us we search in vain for the requisite originality in plaintiff's "Agreement." The "Agreement" contains nothing of substance which resulted from Donald's creative work. The order and arrangement of the subject matter in the "Agreement" are identical with several forms suggested in prior works.

See e.g., 11 Am. Jur. Legal Forms, § 1447 (1958). The word arrangement used, while not identical, is at most only a paraphrase of various portions of earlier forms, and in copyright law paraphrasing is equivalent to outright copying. *Nutt v. National Institute Incorporated for the Improvement of Memory*, 2 Cir. 1929, 31 F.2d 236; *Davis v. E. I. DuPont de Nemours & Co.*, S.D. N.Y. 1965, 240 F.Supp. 612. The plaintiff did no original legal research which resulted in a significant addition to the standard conditional sales contract or chattel mortgage forms; he merely made trivial word changes by combining various forms and servilely imitating the already stereotyped language found therein. In fact it may be fairly assumed that such variations in language as did occur in plaintiff's "Agreement" were deliberately insignificant, for he plainly wanted a valid conditional sales contract or chattel mortgage, and validity was an attribute which the earlier forms had been proved through use to have.

In *Amsterdam v. Triangle Publications, Inc., supra,* the Third Circuit faced a claim to copyright protection in a similar situation. The plaintiff in that case had used several existing maps but little independent original research of his own to prepare a map upon which he claimed a copyright. In denying his map copyright protection from a claimed infringement, the court, adopting the language of the trial court, said:

> "To make his map, the plaintiff had to determine only what information he was going to use from other maps, the emphasis to be given

to that information and the coloring scheme and symbols he was going to use. When he finished, his map by comparison was a new map that contained some information that was not on any one of his base maps but was collectively on all of these maps.

"Is this exercise of judgment and discretion by the plaintiff the type of original work that is intended to be protected by the Copyright Act? I think not.

* * *

". . . The presentation of ideas in the form of books, movies, music and other similar creative work is protected by the Copyright Act. However, the presentation of information available to everybody, such as is found on maps, is protected only when the publisher of the map in question obtains originally some of that information by the sweat of his own brow. Almost anybody could combine the information from several maps onto one map, but not everybody can go out and get that information originally and then transcribe it into a map.

"The plaintiff's reputation as a qualified map maker cannot make copyrightable maps for him. He, or his agents, must first do some original work, get more than an infinitesimal amount of original information. With no re-

> flection whatsoever upon the plaintiff's ability as a map maker or upon other maps published and copyrighted by the plaintiff, it seems to me that the plaintiff's map entitled 'Map of Delaware County, Pa.' is, for lack or (sic) original work, not subject to copyright." 189 F.2d at 106.

In the case before us Donald has contributed nothing more than the map maker in *Amsterdam*. While the "Agreement" is not identical to any single existing form, the substance of each sentence can be found in an earlier form. Thus, like the map in *Amsterdam*, Donald's form is nothing more than a mosaic of the existing forms, with no original piece added. The Copyright Act was not designed to protect such negligible efforts. We reward creativity and originality with a copyright but we do not accord copyright protection to a mere copycat. As one noted authority has observed, "to make the copyright turnstile revolve, the author should have to deposit more than a penny in the box." B. Kaplan, *An Unhurried View of Copyright* 46 (1966). In our case not even the proverbial penny has been placed in the box. Indeed the box is virtually empty. We hold, therefore, that Donald's copyright is invalid for lack of originality. Having concluded that Donald's "Agreement" was not subject to copyright, we think it goes without saying that Moore's use of the form language was not an infringement.

The only remaining questions concern the assessment of costs and attorney's fees. The trial court assessed the

costs of suit against the losing party, Moore, as required by 17 U.S.C.A. § 116. Since we have reversed the trial court's determination on the merits, Donald, the losing party, must pay the costs as required by statute. An award of attorneys' fees is discretionary under § 116, and the trial court exercised this discretion by directing that Donald and Moore pay their own counsel fees. We see no reason to disturb this determination. The counsel fees incurred by Zack Meyer were divided by the trial court equally between Donald and Moore. We think, however, that the entire amount of this expense must be assessed against Donald. Moore has already been put to the expense of defending an infringement suit against an invalid copyright claim. It was Donald who unnecessarily joined Zack Meyer as a party defendant, and it is Donald who should bear the expense for this error.

REVERSED

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1968

No. 28447

D. C. Docket No. CA 66-55-A

O. W. DONALD,

Plaintiff-Appellee,

versus

ZACK MEYER'S T.V. SALES and SERVICE, ET AL,

Defendants,

MOORE BUSINESS FORMS, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

Before WISDOM, GOLDBERG and INGRAHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of said District Court in this cause be, and the same is hereby, reversed.

It is further ordered that plaintiff-appellee pay to

defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

May 20, 1970

Issued as Mandate: Jul 16, 1970

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 28447

O. W. DONALD,

Plaintiff-Appellee,

versus

ZACK MEYER'S T.V. SALES and SERVICE, ET AL.,

Defendants,

MOORE BUSINESS FORMS, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

(7/8, 1970)

ON PETITION FOR REHEARING

Before WISDOM, GOLDBERG and INGRAHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

11:1447 Conditional Sale Contract

This agreement, made this ....1.... day of .....2....., 19.3., between .....4....., seller, and .....5....., of .....6....., County of .....7.... , State of .....8....., purchaser, witnesseth:

The seller hereby sells, and the purchaser hereby purchases, subject to the terms and conditions hereinafter set forth, the property described below, all of which the purchaser agrees to keep and maintain as personal property at .....9..... , City of ....10..... , State of ....11....., to wit:.....12.....(Description of property),

For which the purchaser agrees to pay as follows: .....13.... (Set out schedule of price and payments made and to be made).

Payable at the office of the seller, or of the holder hereof, at holder's option, together with interest payable monthly with each instalment on the unpaid balance at the rate of .....14..... (..... %) per cent per year. On any past due instalments purchaser agrees to pay interest from maturity at maximum legal contract rate.

1. The purchaser agrees to keep the above described property insured against loss or damage by fire, wind, theft, and accident, in an insurance company or companies satisfactory to the seller, in an amount not less than the unpaid portion of the purchase price, such insurance to be payable to the seller as its interest may appear, and the policies therefor to be delivered to and retained by the seller until the purchase price is paid in full. If the purchaser fails at any time to provide such insurance, the seller may have the property insured and the cost of such insurance shall be paid by the purchaser.

2. It is understood that the title to the above described property shall not pass to the purchaser but shall remain vested in and be the property of the seller, or its assigns, until the purchase price, interest, and all other sums due hereunder have been fully paid. Each and all of the conditions and stipulations of this agreement, including the time for making payments, shall be and are of the essence of this contract, and no agreement for any extension of time or postponement of any payment shall be valid unless in writing signed by the then owner of this contract.

3. The purchaser agrees to keep, use, and maintain the property in a careful manner so as not to unreasonably or unnecessarily expose the same to damage, wear, or depreciation, and agrees to keep the same in good order and repair and free of all taxes, liens, and encumbrances whatsoever, and agrees not to remove the property from its place of business described above nor to sell, assign, or transfer its rights under this contract or transfer possession of said property or permit the same to pass from its possession.

4. It is expressly agreed that the property shall be and remain strictly personal property and retain its character as such, no matter in what manner it may be affixed or attached to any building, structure, or premises.

5. In the event of any default by the purchaser in the performance of any of the terms or conditions hereof, the seller may at its option and without notice declare the unpaid portion of the purchase price, together with accrued interest thereof, if any, immediately due and payable, and thereupon the seller may either proceed to collect from the purchaser the balance due or retake possession of the property wherever it may be found, with or without legal process, and hold the same free of all claims of the purchaser and retain as liquidated damages all payment theretofore made.

6. For the purpose of enforcing the seller's rights hereunder, the purchaser authorizes the seller to enter on the premises, with or without notice, and remove the property, and hereby waives any action, or right of action, arising out of such entry and re-possession, and if the matter be placed in the hands of an attorney or collector for suit or collection, the purchaser agrees to pay the reasonable value of such services and expenses.

7. The purchaser admits notice of the intended assignment of this contract and agrees that if this contract be assigned the seller shall not be deemed the agent of the assignee, and all payments shall be made to the assignee or its agents absolutely, hereby waiving all rights now or hereafter existing in the purchaser's favor against the seller to make any defense, counterclaim, or offset to any demand or action brought by the assignee to recover any pavments due hereunder, or to enforce any rights hereunder, or to recover possession of the property, the purchaser agreeing that all claims or demands on his part

against the seller shall be independent of any action or claim by the assignee against the purchaser.

8. It is understood and agreed that no verbal or written understanding or agreement of any kind exists in regard to the property or the payments therefor other than what is herein expressly dated; that all goods purchased hereunder are bought by the purchaser in sole reliance on and subject to the manufacturer's warranty. Any provision of this contract prohibited by laws of any state shall as to such state be ineffective to the extent of such prohibition without invalidating the remaining provisions of this contract.

The buyer acknowledges receipt of a true copy hereof.

In witness whereof, etc.

(Signatures)

No. 807

In the

Supreme Court of the United States

OCTOBER TERM, 1970

O. W. DONALD,

Petitioner,

v.

ZACK MEYER'S T.V. SALES & SERVICE and MOORE BUSINESS FORMS, INC.,

Respondents.

BRIEF IN OPPOSITION FOR RESPONDENT MOORE BUSINESS FORMS, INC.

Statement

The "Statement of the Case" in the Petition recites several supposed "facts" which are erroneous or which are completely without foundation in the record. These need not be belabored here, however — for the facts of this case are fully and accurately stated in the opinion of the court below (reported at 426 F. 2d 1027).

Reasons for Denying the Writ

This case presents nothing worthy of review by this Court. It consists only of the claims of a disgruntled individual whose purported copyright was held invalid — claims which, despite the assertions of the Petition, plainly have no consequence beyond the particular facts and the immediate parties to this litigation.

The petitioner, O. W. Donald, claimed a copyright on a single paragraph which was "nothing more than an ordinary conditional sales contract or chattel mortgage agreement" (426 F. 2d at 1029) . . . which was "printed at the bottom of standard invoice forms which Donald printed and sold to television dealers and repairmen" (426 F. 2d at 1028) . . . and which was the very same type of contract "published in numerous form books, many of which are themselves copyrighted" (426 F. 2d at 1029).

The court of appeals, consequently, held that the supposed copyright was "invalid for lack of originality" because Donald's "Agreement" was only a trivial variation of prior works which were copyrighted or in the public domain (426 F. 2d at 1029-30). In so holding, the court explained:

> "Neither the existence of these earlier forms nor Donald's use of them, however, necessarily renders his paragraph ineligible for copyright protection. It is settled law that to obtain a valid copyright, as distinguished from a patent, the applicant need not show that the material in question is unique or novel; it need only be original. Gelles-Widmer Co. v. Milton Bradley Co., 7 Cir. 1963, 313 F. 2d 143, cert. denied, 373 U.S. 913; Alfred Bell & Co. v. Catalda Fine Arts, 2 Cir. 1951, 191 F. 2d 99. Thus a work may be protected by copyright even though it is based on a prior

> copyrighted work or something already in the public domain if the author, through his skill and effort, has contributed a *distinguishable variation* from the older works. * * *
>
> "* * * something more than merely refraining from outright copying is required before a new variation on an old work has sufficient originality to be copyrightable. *The author must add 'some substantial not merely trivial originality.'* Chamberlin v. Uris Sales Corp. 2 Cir. 1945, 150 F. 2d 512, 513. *The variation must be meaningful and must result from original creative work on the author's part.* * * *
>
> "In the case before us we search in vain for the requisite originality in plaintiff's 'Agreement.' The 'Agreement' contains nothing of substance which resulted from Donald's creative work. The order and arrangement of the subject matter in the 'Agreement' are identical with several forms suggested in prior works. See e.g., 11 Am. Jur. Legal Forms, § 1447 (1958). The word arrangement used, while not identical, is at most only a paraphrase of various portions of earlier forms * * *" (426 F. 2d at 1029-30) (emphasis added).

There is nothing novel or momentous about this holding. These established principles have been applied in numerous other cases and to various types of claimed copyrights — e.g., to arithmetic flash cards in *Gelles-Widmer Co. v. Milton Bradley Co.*, 313 F. 2d 143 (7th Cir. 1963), cert. denied, 373 U.S. 913 (1963); to mezzotint engravings of paintings by old masters in *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F. 2d 99 (2d Cir. 1951); to a design for embroidered dresses in *Millworth Converting Corp. v. Slifka*, 276 F. 2d 443 (2d Cir. 1960); to the rules of a game entitled "Acey-Ducey" in *Chamberlin v. Uris Sales Corp.*, 150 F. 2d 512 (2d Cir.

1945); to a musical composition entitled "Tic Toc" in *Smith v. George E. Muehlebach Brewing Co.*, 140 F. Supp. 729 (W.D. Mo. 1956); and to maps in *Amsterdam v. Triangle Publications, Inc.*, 189 F. 2d 104 (3rd Cir. 1951).[1]

Therefore, the decision of the court of appeals below is manifestly correct. It is not in conflict with decisions of this Court or with decisions of other courts of appeal. And, most certainly, it does not involve any unsettled or novel question or any critical issue of federal law which would warrant review by this Court.

Moreover, not one of the "Questions Presented" stated in the Petition has any basis: *Contrary to question 1*, the decision below was not based solely upon the obvious fact that Donald's "Agreement" was merely a trivial variation of the copyrighted form appearing in 11 Am. Jur. Legal Forms § 1447 (1958); it is obvious from the above quotation that this form, § 1447, was used simply as an example of an "ordinary conditional sales contract" from one of the "numerous [legal] form books" (426 F. 2d at 1029). Of course, *contrary to question 2* — and to the unfounded assertion

[1] Other cases applying the "distinguishable variation" principles discussed in the above-quoted portion of the court of appeals opinion are cited in that opinion (426 F. 2d at 1029-30) and in the cases cited in this Brief.

[2] The court of appeals could well have referred to the 200 pages of chattel mortgage forms and clauses in 3 Am. Jur. Legal Forms §§ 511-808 (1953); to the 28 pages of conditional sales contracts and clauses in 11 Am. Jur. Legal Forms §§ 1446-1516 (1958); to the 63 pages of conditional sales and chattel mortgage forms and clauses in Stayton Texas Forms §§ 1914-1955 (1959); etc.

that the opinion below would invalidate "every copyrighted legal instrument, legal form and legal form book" (Petition, p. 3) — the court of appeals did not hold that legal forms were not copyrightable; instead, it specifically recognized that legal instruments and form books can be copyrighted (426 F. 2d at 1029).[3] And, *contrary to question 3*, the opinion below is not based upon some supposed test of originality peculiar to "map copyrights"; it simply holds that a trivial variation of prior copyrighted works is not subject to copyright because of lack of sufficient originality; and this established principle — as shown by the cases cited in this Brief and in the opinion below — is applicable not only to maps, but also to arithmetic flash cards, to dress designs, to game rules, to musical compositions, and to any other type of copyrighted material.

This Petition, therefore, is baseless. It presents only a private dispute — and a petty one, at that, since the total sales price of the invoices involved in the claimed infringement was only $72.50 (A. 28). No amount of verbiage or unfounded assertions about the meaning or effect of the opinion below can convert such a case into one which warrants review by this Court.

[3] For example, the court of appeals referred to the "numerous [legal] form books, many of which are themselves copyrighted," and it cited a case involving a "copyrighted" legal form (an insurance policy) in pointing out that, if the author of a legal instrument has contributed a "distinguishable variation" from prior copyrighted legal forms, "only those parts which are new are protected by the new copyright. Dorsey v. Old Surety Life Ins. Co., 10 Cir. 1938, 98 F. 2d 872" (426 F. 2d at 1029-30).

Conclusion

For these reasons, as well as those detailed in the opinion below, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that three copies of this Brief in Opposition for Respondent Moore Business Forms, Inc. were, on this 29th day of October, 1970, served by United States air mail, postage prepaid, upon each of the following: John C. Stahl, P.O. Box 13236, San Antonio, Texas 78213, attorney for Petitioner O. W. Donald; and Jack D. Maroney, Brown, Erwin, Maroney & Barber, 900 Brown Building, Austin, Texas 78701, attorney for Respondent Zack Meyer's T.V. Sales & Service.

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